No. 82-1095

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

R. PULLEY, Warden of the California State Prison at San Quentin,

Petitioner,

- v. -

ROBERT ALTON HARRIS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit properly held that the California Supreme Court must review the fitness of respondent Harris' death sentence, pursuant to principles announced by the California Court in other death cases, before Harris was executed and before his remaining constitutional challenges to his conviction and sentence were entertained on the merits in federal habeas corpus proceedings.

2. Whether the California Supreme Court's failure to review the fitness of Harris' death sentence under those principles denied him due process of law.

3. Whether that failure violated his Eighth and Fourteenth Amendment right to be protected against cruel and unusual punishment.

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BRIEF OF RESPONDENT

CITATIONS TO OPINIONS BELOW

The amended opinion of the Ninth Circuit is reported as Harris v. Pulley, 692 F.2d 1189 (9th Cir. 1982). As originally delivered on September 16, 1982, it appears in the appendix to the petition for certiorari [hereafter, "Cert. App."] at page A-1. Amendments made on denial of rehearing, November 15, 1982, appear at Cert. App. A-67.

The United States District Court issued no written opinion. Its remarks in dismissing Harris' habeas corpus petition appear in the Joint Appendix at JA-8.

The opinions of the California Supreme Court on Harris' direct appeal are reported as People v. Harris, 28 Cal.3d 935, 623 P.2d 240, 171 Cal. Rptr. 679 (1981). Neither that court nor the lower

California state courts issued any opinions when denying Harris' state postconviction petitions.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In addition to the provisions set out by petitioner [hereafter, "Pulley"] in his brief [hereafter "Pet. Br."], portions of former California Penal Code §§ 190 - 190.4 are relevant. These appear in Appendix C infra.

STATEMENT OF THE CASE

This case arises from a federal habeas corpus proceeding in which respondent Robert Alton Harris (hereafter, "Harris") raised a number of constitutional challenges to his convictions and death sentences by a California state court for two counts of first-degree murder committed during a robbery and kidnaping. The Ninth

Circuit below rejected some of his claims and sustained others to the extent of requiring further judicial consideration of them. Only one of its rulings in Harris' favor has been brought to this Court on certiorari. We agree with Pulley that, for present purposes, "[t]he facts surrounding Harris' crimes are completely recounted in the California Supreme Court opinion on direct appeal [(see People v. Harris, 28 Cal.3d 935, 943-948, 623 P.2d 240, 243-246, 171 Cal. Rptr. 679, 682-685 (1981)), and] ... are not crucial to the determination of the issue presented in this petition," Pet. Br. 8. We therefore summarize them briefly.[1/]

1/ All of the facts in the following five paragraphs are taken from the pages of the California Supreme Court's opinion just cited, except the facts in the sixth paragraph relating to Harris' childhood treatment by his father. These appear in the testimony of Harris' mother and sister at pages 4603-4608 and 4616-4621 of the trial transcript.

Harris and his younger brother had made extensive plans to rob a bank in Mira Mesa, California (a San Diego suburb). On the morning of the robbery, July 5, 1978, Harris decided on the spur of the moment not to use his own automobile for the get-away. He approached two teenage boys, John Mayeski and Michael Baker, who were eating hamburgers in Mayeski's car in a parking lot across the street from the bank. He displayed a handgun, got into the back seat of the Mayeski car, and apparently ordered the driver to drive to a secluded wooded area beside a nearby lake. Harris' brother followed in Harris' car.

Harris told the two boys that he was going to use their car to rob a bank, and that nobody would be hurt. They offered to wait a while and then to report the car as stolen, giving the police a mislead-

ing description of the thieves. Harris said that that was a good idea, and one of the boys moved off into the brush. Harris suddenly shot the second boy in the back, and fired another shot into him after he fell. Harris pursued the first boy and also shot him to death. He then returned and fired two more close-range shots into the body of the second boy.

Using the boys' car, Harris and his brother completed the bank robbery but were followed from the scene by a by-stander who reported their whereabouts to the police. They were shortly apprehended and both confessed to the killings as well as the robbery.

Harris was subsequently charged with kidnaping, robbing and murdering the two boys, and with several related lesser offenses. The information alleged, as "special circumstances" permitting the

death penalty for each murder,[2] that the murder of one boy had been perpetrated willfully, deliberately and with premeditation in the commission of a robbery and of a kidnaping for the purpose of robbery, and that Harris had also murdered the other boy. A jury in the Superior Court for San Diego County found Harris guilty of first-degree murder for both killings, and found the "special circumstances" true. These findings led to a penalty trial to determine whether Harris should be sentenced to death or to life imprisonment without possibility of parole.[3]

At the penalty trial, the prosecution presented evidence that Harris had been

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2/ The role of "special circumstances" under the California statute authorizing the death penalty for some first-degree murders is described at pages 18-20 infra.

3/ The pertinent California capital-sentencing procedures are described at pages 18-25 infra.

convicted of voluntary manslaughter for the beating death of an acquaintance in 1975; that Harris and others had sodomized a cellmate in jail; that Harris had subsequently compelled this same cellmate to perform oral copulation on him; that Harris had verbally threatened the cellmate's life; and that Harris had been found by jail authorities in possession of a wire garrote and a shank (a jail-made knife) while awaiting trial. Harris presented evidence of his dismal childhood, including severe beatings and denials of paternity by his alcoholic father (who had been sent to prison for sexual offenses against Harris' sister), and Harris' expulsion from home at age 14 by his mother (herself an alcoholic and a convicted bank robber). The jury returned a verdict of death; the trial judge declined to modify it; and, on March 6, 1979, Harris was formally sentenced to die.

On February 11, 1981, the California Supreme Court affirmed the judgment of death. People v. Harris, 28 Cal.3d 935, 623 P.2d 240, 171 Cal. Rptr. 679 (1981). Its opinion discusses numerous issues, none relating to the substantive fitness of Harris' death sentence. Certiorari was denied on October 5, 1981. Harris v. California, 454 U.S. 882 (1981)(Justices Brennan and Marshall dissenting).

On November 17, 1981, Harris filed a habeas corpus petition in the Superior Court of San Diego County, which denied the petition without an evidentiary hearing on November 24, 1981. On November 25, 1981, he filed a similar petition in the California Court of Appeal (4th District, Division One), which summarily denied it the same day. On December 7, 1981, he filed a similar petition in the California Supreme Court, which denied it without opinion on January 13, 1982. (This

Court denied certiorari on June 7, 1982. Harris v. California, 457 U.S. 1111 (1982)(Justices Brennan and Marshall dissenting).)

Harris' execution was set for March 16, 1982. On March 5, he filed the instant habeas corpus petition in the United States District Court for the Southern District of California, raising a number of federal constitutional claims. The district court read the California Supreme Court opinion on Harris' direct appeal but did not examine the state-court record (J.A. 8, 10-11); it heard oral argument but denied an evidentiary hearing (J.A. 24). On March 12, 1982, it dismissed the petition on the merits in an oral opinion (J.A. 8-25) and denied a stay of execution pending appeal (J.A. 24). The Ninth Circuit stayed Harris' execution on March 12, 1982, and ordered the appeal expedited. It heard oral argument on May

11, 1982, and issued its decision on September 16, 1982, affirming the district court on several issues and reversing it on several other issues. (Cert. App. A-1 to A-66.) That decision is described briefly in the following paragraph, and in more detail at pages 46-50 infra. Motions by both parties for rehearing and suggestions for rehearing en banc were denied on November 15, 1982, in an order amending the original opinion slightly (Cert. App. A-67 to A-72). The published version of the Ninth Circuit's opinion, Harris v. Pulley, 692 F.2d 1189 (9th Cir. 1982), contains these amendments.

The Ninth Circuit rejected numerous challenges by Harris to the validity of his conviction, and to the constitutionality of the California death-penalty statute. It granted Harris limited relief on four issues. With respect to his claim

that he had been denied a fair trial by reason of extensive prejudicial pretrial publicity, the Ninth Circuit found that the district court had simply accepted the ultimate conclusion of the California Supreme Court, without reading the state-court record. It therefore remanded with directions to the district court to "examine all relevant parts of the state court record to determine whether the record supports the state court's findings," and then to make an independent determination of the ultimate constitutional question. Cert. App. A-37 to A-38; see Cert. App. A-33 to A-39. With respect to Harris' claims that the death penalty had been applied arbitrarily and discriminatorily in his case, pursuant to a death-sentencing pattern which displayed both racial and gender-based discrimination, the Ninth Circuit found that the district

court had not given Harris an opportunity to develop a record of sufficient completeness to determine whether an evidentiary hearing was required. It therefore remanded with directions to the district court to "provide an opportunity to develop the factual basis and arguments concerning [these two claims]," Cert. App. A-25. See Cert. App. A-23 to A-32. With respect to Harris' claim that he was constitutionally entitled to, and had not been given, appellate review of the proportionality of his death sentence, the Ninth Circuit found that the California Supreme Court had announced its intention to "review each death penalty ... to determine whether the penalty was being applied proportionately," Cert. App. A-20, but that it "did not undertake any proportionality review in [Harris'] ... case," Cert. App. A-21. The Ninth Circuit

accordingly required that the California Supreme Court conduct such review before the district court proceeded to a final adjudication of this and the other remanded issues. Cert. App. A-2 to A-3, A-18 to A-23, A-68, A-70 to A-71. Pulley's petition for certiorari questions solely the last of these four rulings.

SUMMARY OF ARGUMENT

1. The judgment below should be affirmed without reaching any constitutional issue. The federal constitutional question which Pulley tenders is highly abstract and is likely to be either mooted or concretized by further proceedings in the California Supreme Court. That court is still developing standards and procedures for the substantive review of death sentences. It should be permitted to do so in the first instance. The limited federal habeas corpus relief ordered

below to prevent Harris' execution without any state appellate review of the appropriateness of his death sentence was necessitated by the summary denials of his several state postconviction petitions. Sound principles of federalism now counsel against proceeding further to adjudicate his federal habeas corpus claims (several of which were remanded to the district court by portions of the Ninth Circuit's decision on which Pulley has not sought certiorari) before the California Supreme Court has applied its own standards of proportionality review to Harris' case. The Ninth Circuit properly prohibited the State of California from executing Harris pending clarification of his state and federal rights to appellate review, and remitted him to the exhaustion of state remedies which are likely to produce such clarification.

2. While the exact scope of substantive appellate review of death sentences under California law is still in the course of development by the California Supreme Court, it is uncontestable that (a) some appellate review of the fitness of a death sentence is provided by state law as a matter of right, and (b) Harris' death sentence was affirmed and his state postconviction petitions were summarily denied without his having been afforded any review of the fitness of that sentence. This amounts to the arbitrary denial of recourse to an established state adjudicatory procedure and thus a denial of due process of law. The judgment below can and should be affirmed upon this ground, without reaching the broader question whether the Eighth Amendment entitles a death-sentenced defendant to state appellate sentencing review.

3. However, if the issue is reached, the Eighth Amendment does entitle a death-sentenced defendant to meaningful appellate review of the substantive propriety of his sentence. This was recognized last Term in Zant v. Stephens, under a capital-sentencing scheme which is indistinguishable for present purposes from California's. Zant merely makes explicit what is implied in the Court's previous Eighth Amendment decisions dealing with the death penalty: that to leave the infliction of the punishment of death to the unreviewed judgments of individual juries entails a risk of inconsistent and arbitrary sentencing decisions that is unacceptable with life at stake. The overwhelming consensus of the States recognizes that substantive appellate review is the condition of evenhandedness in capital

sentencing. Without it, a broadly discretionary system such as California has at the trial level cannot meet the command of the Eighth Amendment that "capital punishment be imposed fairly, and with reasonable consistency, or not at all." Eddings v. Oklahoma, 455 U.S. 104, 112 (1982).

ARGUMENT

I. INTRODUCTION: CALIFORNIA'S DEATH-SENTENCING PROCEDURES

The issues presented for this Court's consideration are framed by the California capital-sentencing procedures employed in Harris' case. Harris was tried under a statute enacted in 1977, [4] since super-

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4/ 1 Cal. Stats. 1977, ch. 316, pp. 1255-1266. The essential provisions of the 1977 enactment were codified as Cal. Penal Code §§ 190-190.6. This 1977 statute replaced a mandatory death-penalty law enacted in 1973 (1 Cal. Stats. 1973, ch. 719, pp. 1297-1302) which was invalidated in Rockwell v. Superior Court, 18 Cal. 3d 420, 556 P.2d 1101,

seded. 5/

A. Trial Procedures

Under the 1977 statute, a person convicted of first-degree murder was sentenced to life imprisonment unless one or more "special circumstances" was found. Cal. Penal Code §§ 190, 190.2. 6/ If a "special circumstance" was found, the punishment was either death or life imprisonment without possibility of parole. §§ 190, 190.2. The "special

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4/ continued

134 Cal. Rptr. 650 (1976), under the authority of Woodson v. North Carolina, 428 U.S. 280 (1976), and [Stanislaus] Roberts v. Louisiana, 428 U.S. 325 (1976).

5/ Proposition 7, the "Briggs Initiative," approved at the general election of November 7, 1978, replaced the 1977 statute with provisions currently in effect. These are codified in present Cal. Penal Code §§ 190-190.7 (West 1983 cum. pocket part). One of the provisions of the Briggs Initiative was before the Court in California v. Ramos, 51 U.S.L.W. 5220 (U.S., July 6, 1983).

6/ All references to "Cal. Penal Code § ___," "Penal Code § ___," or "§ ___," are to the 1977 version of the California Penal Code. See notes 4 and 5 supra.

circumstances" were enumerated in Penal Code § 190.2. They included those found in Harris' case: that the murder was willful, deliberate and premeditated, and was committed during the commission of a robbery (§ 190.2(c) (3)(i)) or a kidnaping (§ 190.2(c)(3)(ii)), and that the defendant was convicted of more than one murder (§ 190.2(c)(5)).

"Special circumstances" were alleged in the charging paper and tried with the issue of guilt at the first phase (hereafter, "the guilt phase") of a bifurcated trial. §§ 190.1(a), (c), 190.4(a). At that phase, the trier of fact (hereafter, "the jury") determined guilt and degree of murder, and was required to make a finding whether each "special circumstance" allegation was true or not true. §§ 190.1(a), 190.4(a). A "special circumstance" could be found true only if proved beyond a reasonable doubt. §190.4(a).

If the jury found first-degree murder and a special circumstance at the guilt phase, the trial proceeded to a sentencing hearing (hereafter, "the penalty phase"). §§ 190.3, 190.4(a). Additional evidence was received if offered, and the jury's attention was directed to a list of ten aggravating and mitigating circumstances enumerated in Penal Code § 190.3.7/

7/ Section 190.3, ¶5 provided:

> In determining the penalty the trier of fact shall take into account any of the following factors if relevant:
> (a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1.
> (b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the expressed or implied threat to use force or violence.
> (c) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.
> (d) Whether or not the victim was a participant in the defendant's homicidal act.
> (e) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a

"After having heard and received all of the evidence," the jury was to "consider, take into account and be guided by the aggravating and mitigating circumstances referred to" in this list, and was to "determine whether the penalty shall be death or life imprisonment without the possibility of parole."[8/]

7/ continued

> moral justification or extenuation for his conduct.
>
> (f) Whether or not the defendant acted under extreme duress or under the substantial domination of another person.
>
> (g) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or the affects of intoxication.
>
> (h) The age of the defendant at the time of the crime.
>
> (i) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.
>
> (j) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

8/ Cal. Penal Code § 190.3, ¶6: "After having

The jury's sentencing determination was not otherwise structured. (We make this point not to criticize these trial-level procedures here, but simply to place in proper context the issue of the role of appellate review in California's 1977 death-sentencing scheme.[9]) The jury was not instructed to weigh aggravating against mitigating factors. Indeed, the

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8/ continued

heard and received all of the evidence, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall determine whether the penalty shall be death or life imprisonment without the possibility of parole."

9/ It is plain from Zant v. Stephens, 51 U.S.L.W. 4891 (U.S., June 22, 1983), that the Eighth Amendment's requirements regarding appellate review in death cases depend upon the nature of the trial proceedings which, under any State's particular capital-sentencing scheme, its appellate courts are called upon to review. Thus, although the only issues before the Court within the scope of Pulley's petition for certiorari in the present case have to do with proceedings at the appellate level under the 1977 statute, those appellate proceedings must be viewed within the framework of the 1977 scheme as a whole.

ten listed factors were not explicitly designated as "aggravating" or "mitigating."[10/] No burden of proof was was provided to govern the jury's consideration of them, except that (by judicial construction) prior violent offenses proffered by the prosecution in

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10/ They are denominated simply as "factors" to be "take[n] into account" in the paragraph that sets them out, § 190.3, ¶5, note 7 supra, and are then called collectively "aggravating and mitigating circumstances" in the following paragraph, note 8 supra. Some of the factors are obviously either aggravating (e.g., "[t]he presence ... of criminal activity by the defendant which involved the use or attempted use of force or violence or the expressed or implied threat to use force or violence," § 190.3 (b)) or mitigating (e.g., "[w]hether ... the defendant was an accomplice [whose] ... participation in the commission of the offense was relatively minor," § 190.3(i)). However, others might well be viewed by particular juries as aggravating and by other juries as mitigating: e.g., "[w]hether at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of ... the affects [sic] of intoxication," § 190.3(g); and the list leaves each individual jury (or juror) free to determine, for example, whether the "absence of [violent] criminal activity" under subsection 190.3(b) is a mitigating factor or simply a neutral one.

aggravation [11] were required to be proved beyond a reasonable doubt.[12] (Jury unanimity was not, however, required in the finding of a prior violent offense before it could be considered as an aggravating circumstance.) The jury was not required to specify in its life-or-death verdict which -- if any -- aggravating or mitigating circumstances it had found, or otherwise to state the reasons for its ultimate sentencing determination.[13] It was not told that it, or any individual juror in his or her deliberations, had to find any particular

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11/ Cal. Penal Code § 190.3(b), note 7 supra.

12/ People v. Robertson, 33 Cal.3d 21, 53-55, 655 P.2d 279, 297-299, 188 Cal. Rptr. 77, 95-97 (1982) (plurality opinion); id., 33 Cal.3d at 60-63, 655 P.2d at 302-305, 188 Cal. Rptr. at 100-103 (concurring opinion of Justice Broussard).

13/ See People v. Frierson, 25 Cal.3d 142, 178-179, 599 P.2d 587, 608-609, 158 Cal. Rptr. 281, 302-303 (1979)(plurality opinion); People v. Jackson, 28 Cal.3d 264, 316-317, 618 P.2d 149, 176, 168 Cal. Rptr. 603, 630 (1980)(plurality opinion).

fact or circumstance to warrant the choice of death over life imprisonment without parole. There was no burden of proof on the ultimate issue. 14/

If the jury returned a death verdict, the defendant was deemed to have made a motion to modify the verdict. Cal. Penal Code § 190.4(e). In ruling on this motion, the trial judge was to "review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances ... and ... make an independent determination as to whether the weight of the evidence supports the jury's findings and verdicts." Ibid. The judge was to "state on the record the reason for his findings." Ibid.

B. Appellate procedures

Under California law predating 1977,

14/ See People v. Frierson, note 13 supra, 25

"[w]hen upon any plea a judgment of death is rendered, an appeal is automatically taken" to the California Supreme Court. Cal. Penal Code § 1239(b) (West 1982).[15] Prior to 1977, it was settled that this automatic appeal did not encompass substantive sentencing review, as distinguished from review of procedural or evidentiary errors in the trial proceedings and review of the sufficiency of the evidence of guilt.[16] The 1977 statute provided that "[t]he denial of the modification of a death penalty verdict [by the trial judge] ... shall be reviewed on the

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14/ continued

Cal.3d at 180, 599 P.2d at 609, 158 Cal. Rptr. at 303.

15/ A 1982 amendment to § 1239(b) is not presently relevant. It appears in West's 1983 cumulative pocket part.

16/ In re Anderson, 69 Cal.2d 613, 623, 447 P.2d 117, 124, 73 Cal. Rptr. 21, 28 (1968), and cases cited.

defendant's automatic appeal," § 190.4(e), but did not elucidate the scope of appellate review.

The California Supreme Court first addressed its review function under the 1977 law in People v. Frierson, 25 Cal.3d 142, 599 P.2d 587, 158 Cal. Rptr. 281 (1979). Frierson's conviction and sentence were reversed on unrelated grounds. Anticipating retrial, three Justices examined the federal constitutionality of the statute and upheld it. Four deferred ruling on that question. 17/

In the opinion upholding the statute (hereafter, "plurality opinion"), Justice

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17/ Justice Richardson, joined by Justices Clark and Manuel, sustained the statute against both state and federal constitutional challenges. 25 Cal.3d at 172-188, 599 P.2d at 604-614, 158 Cal. Rptr. at 298-308. Justice Mosk, joined by Justice Newman, sustained the statute against state constitutional challenges but reserved final decision as to its federal constitutionality. 25 Cal.3d at 188-196, 599 P.2d at 615-620, 158 Cal. Rptr. at 308-313. Chief Justice Bird and Justice Tobriner, in separate opinions, also reserved judgment on the federal issues. 25 Cal.3d at 196-199, 599 P.2d at 620-622, 158 Cal. Rptr. at 313-315.

Richardson responded to the contention that the federal Constitution required "'proportionality review,'" 25 Cal.3d at 180, 599 P.2d at 610, 158 Cal. Rptr. at 303, and that the 1977 statute provided none. He wrote that "the lack of any express provision for proportionality review is not fatal to the validity of a death penalty statute," 25 Cal.3d at 181, 599 P.2d at 610, 158 Cal. Rptr. at 304 (emphasis in original), citing Proffitt v. Florida, 428 U.S. 242 (1976), where "although the Florida statute contained no express provision for proportionality review, effective appellate review would be guaranteed by the requirement that the trial judge file written findings justifying the imposition of death [and] ... the Supreme Court of Florida 'considers its function to be to "[guarantee] that the [aggravating and mitigating] reasons present in one case will reach a similar

result to that reached under similar circumstances in another case . . . ."'" 25 Cal.3d at 181, 599 P.2d at 610, 158 Cal. Rptr. at 304. See also 25 Cal.3d at 184, 599 P.2d at 612, 158 Cal. Rptr. at 305. Viewing Jurek v. Texas, 428 U.S. 262 (1976), in the same vein, the plurality thought it significant that "the United States Supreme Court has recently denied review of several death penalty cases from other states, the statutes of which also fail to provide for any proportionality review, but the courts of which have stated that they will perform a comparable function." 25 Cal.3d at 182, 599 P.2d at 610, 158 Cal. Rptr. at 304. Prior California cases established that the California Supreme Court was not to substitute its judgment for the sentencer's, but did not suggest "that we were powerless to vacate or reduce a

penalty which was so disproportionate as to amount to cruel or unusual punishment." 25 Cal.3d at 182, 599 P.2d at 611, 158 Cal. Rptr. at 305. "A disproportionate penalty would reasonably constitute 'error,'" reviewable on appeal. 25 Cal.3d at 183, 599 P.2d at 611, 158 Cal. Rptr. at 305.

> "Moreover, we are now guided by well established proportionality principles of general application. In reviewing assertions that a particular sentence amounts to cruel or unusual punishment under the state Constitution (art. I, § 17), we must determine whether the penalty 'is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.' (In re Lynch (1972) 8 Cal.3d 410, 424 [105 Cal. Rptr. 217, 503 P.2d 921] ... ; see also People v. Wingo (1975) 14 Cal.3d 169, 182-183 [121 Cal. Rptr. 97, 534 P.2d 1001][proportionality review on a case-by-case basis for offenses involving a wide range of conduct]; People v. Anderson, ... 6 Cal.3d 628, 641-645 [100 Cal. Rptr. 152, 493 P.2d 880 (1972)] and cases cited [proportionality review in earlier death penalty cases].

"In determining disproportionality under Lynch, we examine 'the nature of the offense and/or the offender, with particular regard to the degree of danger both present to society.' (8 Cal.3d at p. 425.) In addition, we ascertain whether more serious crimes are punished in this state less severely than the offense in question. If so, 'the challenged penalty is to that extent suspect.' (Id., at p. 426.) Finally, under Lynch we compare the challenged penalty with the punishments prescribed for the same offense in other jurisdictions having identical or similar constitutional provisions regarding cruel and/or unusual punishment. (Id., at p. 427.) Although not all of these tests of disproportionality may be appropriate in reviewing a sentence of death in a particular case, our Lynch principles demonstrate our awareness of a constitutionally derived responsibility to assess the proportionality of a particular punishment in criminal cases generally to assure that justice is dispensed in a reasonably evenhanded manner. Such a responsibility and commitment borne in criminal cases which invoke a more modest sanction can be no less when the penalty is most extreme." (25 Cal.3d at 183, 599 P.2d at 611-612, 158 Cal. Rptr. at 305.) 18/

18/ In this quotation, the emphasis and all brackets except the parallel cite for Anderson are found in the original.

[footnote continued on next page]

In People v. Jackson, 28 Cal.3d 264, 618 P.2d 149, 168 Cal. Rptr. 603 (1980),

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18/ continued

The principle established in In re Lynch -- that the California Constitution affords relief against a punishment that is "so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity," 8 Cal.3d at 424, 503 P.2d at 930, 105 Cal. Rptr. at 226 -- has been developed in subsequent cases. Lynch itself involved a facial attack upon the statutory penalty for a particular crime: life imprisonment for recidivist indecent exposure. Applying Lynch in In re Foss, 10 Cal.3d 910, 519 P.2d 1073, 112 Cal. Rptr. 649 (1974), and In re Grant, 18 Cal.3d 1, 553 P.2d 590, 132 Cal. Rptr. 430 (1976), the California Supreme Court struck down over-long mandatory parole preclusion periods under California's former Indeterminate Sentencing Law, even while recognizing that such preclusion might be appropriate for some offenders convicted of the categories of crimes in question. What was wrong with the preclusions was "their overbreadth in absolutely prohibiting parole for substantial periods of time without regard to the gravity of the particular offense, the relevance, remoteness in time, or seriousness of the prior offenses, the nature of the offender, or the existence of possible mitigating circumstances," In re Grant, supra, 18 Cal.3d at 8 n.6, 553 P.2d at 594-595 n.6, 132 Cal. Rptr. at 434-435 n.6. In People v. Wingo, 14 Cal.3d 169, 534 P.2d 1001, 121 Cal. Rptr. 97 (1975), the court dealt with an assault statute covering a broad spectrum of differentially culpable conduct. It accepted the contention that "there may ... be occasions where because of the lack of culpability of the individual offender a

the California Supreme Court for the first time sustained a death sentence under the 1977 statute. Writing again for a three-member plurality, Justice Richardson

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18/ continued

life-maximum sentence would be an unconstitutional application of [this statute]." 14 Cal.3d at 181, 534 P.2d at 1011, 121 Cal. Rptr. at 107. But because there were other occasions on which the application of the statute would be constitutionally unexceptionable, the court preferred to wait until the California Adult Authority acted to fix the individual offender's sentence before adjudicating his "'vested right' in insuring that his term be fixed proportionately to his offense." 14 Cal.3d at 182, 534 P.2d at 1012, 121 Cal. Rptr. at 108. In In re Rodriguez, 14 Cal.3d 639, 537 P.2d 384, 122 Cal. Rptr. 552 (1975), the individual defendant had already served 22 years in prison for a violation of California Penal Code § 288 (lewd and lascivious acts on a child). The court noted that a 22-year sentence might well be permissible for some offenders under § 288, 14 Cal.3d at 647, 537 P.2d at 390, 122 Cal. Rptr. at 558, but invalidated Rodriguez's 22-year sentence as "disproportionate to the individual prisoner's offense," 14 Cal.3d at 652, 537 P.2d at 393, 122 Cal. Rptr. at 561, noting that the Lynch "techniques [of analysis] are appropriate not only to the examination of statutes challenged on their face, but also to terms as fixed by the Authority in individual cases," 14 Cal.3d at 653-654, 537 P.2d at 395, 122 Cal. Rptr. at 563. See also, e.g., People v. Keogh, 46 Cal. App.3d 919, 928-933, 120 Cal. Rptr. 817, 822-825 (1975); People v. Vargas, 53 Cal. App.3d 516, 533-539, 126 Cal. Rptr. 88, 100-104 (1975).

adopted his Frierson discussion of "[t]he issue of proportionality review." 28 Cal.3d at 317, 618 P.2d at 176, 168 Cal. Rptr. at 630. Responding to an "argument that because the California Legislature rejected proposed legislation to add proportionality review to the 1977 law, we should not 'read into' that law similar provisions in order to preserve its constitutionality," 28 Cal.3d at 317, 618 P.2d at 176, 168 Cal. Rptr. at 630, the Jackson plurality repeated its Frierson observation that the Legislature may well have thought an express provision for proportionality review "wholly unnecessary in the light of ... Proffitt and Jurek ... which had upheld Florida and Texas statutes containing no express provision whatever for proportionality review." 28 Cal.3d at 317, 618 P.2d at 176-177, 168 Cal. Rptr. at 630-631 (emphasis in

original).

> "It is also suggested that the form of proportionality review which Frierson assures will be available (based upon the three-pronged test of In re Lynch ...) is too narrow because it fails to determine whether the penalty is proportional to other sentences imposed for similar crimes. This statement, however, appears to ignore Frierson's express reference to the second and third prongs of the Lynch test, under which a comparable inquiry is to be made. .... In any event, as we indicated in Frierson ... , we stand fully prepared to afford whatever kind of proportionality review may be held constitutionally mandated by the high court." (28 Cal.3d at 317, 618 P.2d at 177, 168 Cal. Rptr. at 631.)

Three Justices dissented in Jackson, two arguing specifically that proportionality review should not be read into the 1977 statute because of its legislative history, and that the measure of proportionality review promised by Frierson was, in any event, inadequate to meet federal constitutional requirements. 28 Cal.3d at 358-363, 618 P.2d at 190-194, 168 Cal. Rptr. at 644-648. The fourth vote to uphold the

statute was cast by Justice Newman, who wrote that "courts are not timid in reading into legislation various procedural and other rules deemed constitutionally required that the draftsmen may have overlooked or rejected," 28 Cal.3d at 319, 618 P.2d at 178, 168 Cal. Rptr. at 632, and that he agreed with the plurality's rejection of arguments that the 1977 statute was unconstitutional for want of proportionality review. 28 Cal.3d at 318, 618 P.2d at 177, 168 Cal. Rptr. at 631.

We have described at page 8 supra the California Supreme Court's affirmance of respondent Harris' death sentence, the second which it sustained under the statute. Eleven weeks after the Ninth Circuit's decision in the present case, the California Supreme Court handed down opinions affirming a third. People

v. Easley, 33 Cal.3d 65, 654 P.2d 1272, 187 Cal. Rptr. 745 (1982) (decision on rehearing pending). Rehearing has since been granted in Easley, and the case has been reargued. However, the original opinions deserve note. 19/ Six Justices sat in Easley. A three-member plurality (Justices Richardson, Newman and Kaus) upheld the federal constitutionality of the 1977 statute on authority of Frierson and Jackson. Justice Mosk (who deferred decision on this issue in Frierson and dissented in Jackson) filed a brief notation of concurrence in Easley. Two Justices dissented.

Justice Kaus, in addition to joining the plurality opinion, wrote separately to state his view that "the court's pronouncements on the subject of proportionality

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19/ Rehearing was sought, and presumably granted, on issues other than those relating to proportionality review.

review [in Frierson and Jackson] ... can reasonably be interpreted to mean simply that nothing in the 1977 statute or its legislative history precludes this court from exercising such review, and to leave open the question of the specific form of such review that will be undertaken." 654 P.2d at 1293, 187 Cal. Rptr. at 765. Recapitulating the Frierson and Jackson plurality opinions, Justice Kaus noted that Frierson had relied "[i]n particular ... on State v. Simants (1977) 197 Neb. 549, 250 N.W.2d 881 and even quoted part of a 'promise' by that court that it would conduct proportionality review. This promise was in no way contingent on further prodding from Washington, D.C." 654 P.2d at 1293, 187 Cal. Rptr. at 766. 20/

20/ In a footnote to this passage, Justice Kaus notes that the non-final decision of the Ninth Circuit in the present case "has interpreted

Justice Kaus noted Frierson's reference to "our experience with 'well established proportionality principles of general application'" under In re Lynch and its progeny. He noted the Jackson dissenting argument "that review of compliance with the prohibition against cruel and/or unusual punishments under the Lynch criteria was not the kind of proportionality review which, in the dissent's view, was constitutionally required." He noted the Jackson plurality's response invoking "the second prong of the Lynch test, which requires a court to determine 'whether more serious crimes are punished in this state less severely than the offense in question.'" He noted the Jackson plurality's insistence that "'we

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20/ continued

Frierson as extending a similar promise to persons condemned to death in this state." 654 P.2d at 1293 n.6, 187 Cal. Rptr. at 766 n.6.

stand fully prepared to afford whatever kind of proportionality review may be held constitutionally mandated by the high court.'" 654 P.2d at 1293-1294, 187 Cal. Rptr. at 766-767. Then Justice Kaus went on:

> "With all respect, if -- I said if -- the Lynch approach is inadequate, this 'you call us, we won't call you' language can hardly be described as a holding on the two basic issues yet to be decided: is proportionality review constitutionally mandated and, if so, just what type of review is involved.
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> . . . .
>
> "For these reasons I consider the issues of the necessity and nature of proportionality review as unsettled by this court's prior decisions. I express no personal view on these questions, but obviously before any judgment of death is actually carried out, we will have to decide whether such review is constitutionally mandated and, if so, just what it entails. 8/ If the decision is that review is required, it will have to be afforded to each person condemned to

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"8/ The issue is presently before us in In re Jackson, Crim. 22165." (Footnote in original.)

death, including Easley. 9/" (654 P.2d at 1294, 187 Cal. Rptr. at 767.)

Justice Kaus believed that "an appeal from a judgment imposing the death penalty ... examines the trial record for reversible error. Proportionality review, on the other hand, would solely be a function of this court. Therefore, I join in affirming the judgment, but only on my understanding that the affirmance does not preclude the defendant from seeking proportionality review in this court." 654 P.2d at 1294, 187 Cal. Rptr. at 767.

Chief Justice Bird dissented in Easley, writing that she could not agree with Justice Kaus "that the issue of proportionality review may be resolved

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"9/ The next problem — and it is a major one — would be the ability of this court, as presently staffed and equipped, to conduct meaningful review." (Footnote in original.)

some time in the future." 654 P.2d at 1294-1295, 187 Cal. Rptr. at 767.

> " ... Although the appellant in this case is told he is 'not preclude[d] from seeking proportionality review in this court,' he is not advised how to go about it. Another capital defendant whose death sentence was affirmed by this court on direct appeal attempted to raise the issue of proportionality review by means of habeas corpus. (See In re Robert Alton Harris, Crim. No. 22380.) This court denied his petition -- summarily and without any indication that he had merely requested the wrong type of relief. 10/ If there is some post appeal procedure for proportionality review, as is necessarily implied by the concurring opinion, this court has kept its existence a dark secret." (654 P.2d at 1306, 187 Cal. Rptr. at 778.)

II. THE DECISION BELOW CAN AND SHOULD BE AFFIRMED WITH NO NEED TO REACH THE EIGHTH AMENDMENT ISSUE PRESENTED BY PETITIONER

"10/ It is true that the issue of proportionality review is within the technical scope of the cause before this court in In re Jackson, Crim. No. 22165. However, that case raises other legal issues as well . . . . Thus, the issuance of the

Two considerations call for affirmance of the Ninth Circuit's judgment without regard to the Eighth Amendment questions that Warden Pulley asks this Court to resolve. We note them at the outset because a disposition on these grounds would respect this Court's long-standing rules against adjudicating "constitutional issues affecting legislation ... in advance of the necessity of deciding them; in broader terms than are required by the precise facts to which the ruling is to be applied; [or] if the record presents some other ground upon which the case may be disposed of . . . ." Rescue Army v. Municipal Court, 331 U.S. 549, 569 (1947).

The Court has only recently reminded

"10/ continued

order to show cause in Jackson does not necessarily indicate we will reach the issue of proportionality there." (Footnote in original.)

us of the importance of the Rescue Army "'policy of strict necessity.'" Minnick v. California Department of Corrections, 452 U.S. 105, 122 (1981). It has pointed out that the application of the policy to avoid premature constitutional adjudication in Rescue Army was based upon "the 'highly abstract form' in which the constitutional issues were presented, ... the 'ambiguous' character of the California court's construction of the [state law involved] ..., and a belief that further proceedings in the state court would ultimately tender 'the underlying constitutional issues in clean-cut and concrete form,'" Minnick v. California Department of Corrections, supra, 452 U.S. at 123. Each of those concerns is rampant in the present case. Moreover, here, as in Parker v. County of Los Angeles, 338 U.S. 327 (1949), it appears from the superven-

ing Easley opinions in the California Supreme Court that state-court proceedings may already be afoot which would moot or concretize Pulley's tendered Eighth Amendment questions.

Decision of those questions now is not strictly, or even mildly, necessary. The disposition of Harris' federal habeas corpus case by the Ninth Circuit simply remits it to the California Supreme Court for initial consideration of the proportionality of Harris' death sentence before other federal constitutional issues are taken up by the United States District Court. This was entirely proper on procedural grounds that require no substantive constitutional adjudication by this Court. (Part II-A infra.) The Ninth Circuit's disposition was also appropriate on a rudimentary due process ground. (Part II-B infra.) While this latter

ground does implicate a substantive constitutional issue, it is a very narrow one. The policy of avoiding constitutional decisions in advance of strict necessity implies the corollary that broader constitutional issues will not be reached if narrow ones suffice to resolve the case. E.g, Street v. New York, 394 U.S. 576, 581 (1969); Kolender v. Lawson, 51 U.S.L.W 4532, 4535 n.10 (U.S., May 2, 1983).21/

A. The Ninth Circuit's Judgment in Procedural Context

Both the procedural posture of this litigation and the precise disposition of

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21/ "Respondent may, of course, defend the judgment below on any ground which the law and the record permit, provided the asserted ground would not expand the relief which has been granted." Smith v. Phillips, 455 U.S. 209, 215 n.6 (1982), and cases cited. See also, e.g., United States v. American Railway Express Co., 265 U.S. 425, 435-436 (1924); Bondholders Committee v. Commissioner, 315 U.S. 189, 192 n.2 (1942).

the proportionality-review issue by the Ninth Circuit are obscured in Pulley's brief to this Court. Both should be kept in focus.

(1) Following summary denials of postconviction relief by three levels of California state courts, Harris filed the present habeas corpus petition in United States District Court. The district court dismissed it precipitously -- and erroneously, as the Ninth Circuit below held -- without (a) examining "all relevant parts of the state court record" (Cert. App. A-35; see id. at A-34 to A-39) bearing upon Harris' prejudicial publicity claim, or (b) providing Harris "an opportunity to develop the factual basis and arguments" concerning two specific claims of discriminatory application of the death penalty (Cert. App. A-25; see id. at A-29 to A-30, A-31 to A-32), to the extent

necessary to determine whether a federal evidentiary hearing on those claims was warranted. Consequently, the Ninth Circuit held that further proceedings on these three claims were required in the district court. (Cert. App. A-23 to A-32, A-33 to A-39.) Pulley has not sought certiorari to review that holding.

(2) Also, finding that "[t]he California [Supreme C]ourt ... did not undertake any proportionality review in this case" after having stated in Frierson and Jackson that it would do so (Cert. App. A-21), the Ninth Circuit ordered the district court to (a) "grant the petition relieving [Harris] ... from his sentence of death unless the California Supreme Court undertakes, within a reasonable time not to exceed 120 days ... the proportionality review announced in People v. Frierson ... and People v. Jackson" (Cert.

App. A-68), and (b) thereafter, "[i]f it becomes necessary, ... [to] examine the California Supreme Court's proportionality decision to make certain that it is consistent with Proffitt v. Florida ... and Gregg v. Georgia ..." (Cert. App. A-2 to A-3).[22/] Thus the Ninth Circuit did not require the California Supreme Court to conduct any particular form of proportionality review specified by the Circuit, but rather required it only to conduct whatever form of proportionality review the California Supreme Court itself

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22/ The quoted passages are from the Ninth Circuit's summary of its decision, at the beginning of its opinion. In its "Conclusion" at the end of the opinion, it repeats the substance of the first passage in transposed order, writing that "[b]ecause the California Supreme Court did not undertake the proportionality review it announced in People v. Frierson ... and in People v. Jackson," the district court is instructed to relieve Harris of his death sentence unless the California Supreme Court "undertakes ... the proportionality review." (Cert. App. A-71.) Obviously, "the proportionality review" here means again "the proportionality review ... announced in People v. Frierson ... and in People v. Jackson."

had said in Frierson and Jackson that it would conduct. The consistency of this review with Gregg and Proffitt was then to be considered by the district court, together with Harris' other federal constitutional claims on which further district court proceedings were necessary.

Thus, the Circuit Court declined to fashion a death-sentencing procedure for California, leaving the California Supreme Court to fashion its own. This was eminently wise, as Zant v. Stephens, 51 U.S.L.W. 4891 (U.S., June 22, 1983), and Barclay v. Florida, 51 U.S.L.W. 5206 (U.S., July 6, 1983), most recently attest. The Circuit Court declined to permit federal habeas corpus litigation to proceed further on this or other issues until the California Supreme Court had both clarified "the form of proportionality review which Frierson assures will

be available," People v. Jackson, supra, 28 Cal.3d at 317, 618 P.2d at 177, 168 Cal. Rptr. at 631, and applied that form of proportionality review to Harris' case. This too was eminently wise, as Rose v. Lundy, 455 U.S. 509 (1982), attests. For, while Harris' federal constitutional contentions, including his proportionality-review contention, were all technically exhausted under the rule of Roberts v. LaVallee, 389 U.S. 40 (1967)(per curiam), the unexplained tension between the California Supreme Court's Frierson/Jackson assurances and its performance in Harris' case plainly suggested the desirability of "'allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights,'" Rose v. Lundy, supra, 455 U.S. at 518, quoting Duckworth v. Serrano, 454 U.S. 1, 3 (1981)(per curiam).

This was precisely what the Court of Appeals did, and nothing more. Its disposition required the California Supreme Court to begin (not to complete) within four months any procedure of the California Court's choosing which would give Harris "the proportionality review announced in ... Frierson ... and ... Jackson" (Cert. App. A-68). The scope and manner of that review were left to the California Court. The California Court was left free to interpret Frierson/Jackson review broadly or narrowly, on either state-law or federal-law grounds. Since Frierson and Jackson had grounded proportionality review both upon the obligation "to guard and protect rights secured by the Constitution," Ex parte Royall, 117 U.S. 241, 251 (1886), and upon "well established proportionality principles of general application" under state

law, People v. Frierson, supra, 25 Cal.3d at 183, 599 P.2d at 611, 158 Cal. Rptr. at 305, this was manifestly appropriate. See Parker v. County of Los Angeles, supra, 338 U.S. at 332. To be sure, the product of the California Supreme Court's Frierson-Jackson review would then be subject to assessment by the United States District Court "to make certain that it is consistent with Proffitt ... and Gregg ..." (Cert. App. A-2 to A-3). But such an assessment would have been required no matter what the Ninth Circuit did -- unless, of course, it had simply permitted Harris' execution to be carried out.

If Harris had not been slated for imminent execution, the Ninth Circuit might have achieved the same result by remitting him to the further pursuit of state remedies without considering at all, at this stage, any Eighth Amendment issue.

But Harris was slated for imminent execution. When this case reached the federal courts, every cognizant California state court -- including the California Supreme Court -- had summarily dismissed his postconviction petitions and denied him a stay of execution. Federal habeas corpus alone stood between Harris and the executioner. After the Ninth Circuit granted him a stay and decided his case, Justice Kaus indicated in Easley that there may be some yet undetermined procedure by which the California Supreme Court means to conduct proportionality review in death cases, and, if so, that such review "will have to be afforded to each person condemned to death." Pages 40-41 supra. The fashioning of a procedure of this sort is within the sole province of the California Court, where the Ninth Circuit's decision below properly leaves it. But Harris is

entitled to know whether such a procedure exists, and what it is, so that he can resort to it before being put to death. Cf. Young v. Ragen, 337 U.S. 235 (1949); Jennings v. Illinois, 342 U.S. 104 (1951).

All that the Ninth Circuit's decision does is to ensure that this clarification will occur before Harris dies, and before his federal constitutional claims are finally adjudicated by the federal courts. Orderly proceedings for the protection of the constitutional rights of a death-sentenced inmate in both sets of courts having "the solemn responsibility ... 'to guard, enforce, and protect every right granted or secured by the Constitution'"[23/] requires no less. On this account alone, the judgment of the Ninth Circuit represents the most appropriate disposition of

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23/ Steffel v. Thompson, 415 U.S. 452, 460-461 (1974), quoting Robb v. Connolly, 111 U.S. 624, 637 (1884).

the case in its present posture, and should be affirmed.

B. Due Process of Law

The Ninth Circuit's judgment was also proper under elemental due process principles. The Circuit Court found (1) that the California Supreme Court had "stated that it would review each death penalty under the challenged statute to determine whether the penalty was being applied proportionately," Cert. App. A-20, 24/ and (2) that the California Supreme Court "did not undertake any proportionality review in this case," Cert. App. A-21. These two findings plainly establish a due

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24/ Technically, the Court of Appeals wrote that "a plurality of the California Supreme Court in ... Frierson" stated this. Cert. App. A-20. However, the Court of Appeals then went on to note the endorsement and amplification of the Frierson opinion by a majority of the California Supreme Court in Jackson. Cert. App. A-20 to A-21. See pages 32-36 supra.

process violation.

Pulley does not seriously question the second finding, and it is not questionable. 25/ Pulley does question the first. His two pages devoted to this subject (Pet. Br. 22-23) speak for themselves, when compared with the actual holdings and language of the California

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25/ Pulley does assert that "Robert Harris has pressed his claims on 13 separate occasions in 6 separate courts" and has therefore "had all the process he is due." Pet. Br. 48-49. However, the meaning of this and like passages in Pulley's brief is explained at Pet. Br. 43: "It is because Harris has already had so many opportunities to present any claim that the death penalty has been imposed arbitrarily or discriminatorily as to him, that we have repeatedly said that he has had whatever 'proportionality review' may be deemed necessary." Pulley does not contend that the California Supreme Court has in fact reviewed the substantive propriety of Harris' death sentence, on proportionality grounds or any others. Nor could such a contention survive one minute's scrutiny. The California Supreme Court opinion on Harris' automatic appeal meticulously enumerates and discusses fifteen separate and distinct issues which it is deciding, none of which relates remotely to any substantive review of the sentence. People v. Harris, 28 Cal.3d 935, 623 P.2d 240, 171 Cal. Rptr. 679 (1981). The Court denied his postconviction habeas petition summarily, without opinion.

Supreme Court in Frierson and Jackson, which we have set forth in detail at pages 27-36 supra. Pulley would apparently have the court in Frierson and Jackson saying: "Frierson and Jackson contend that the 1977 statute is unconstitutional because it fails to provide for proportionality review. We reject this contention on the ground that we have ample power to review the proportionality of death sentences. [Sotto voce: But we won't.] Moreover, well-established proportionality principles of general application under California law call upon us to assess whether even lesser punishments than death are being proportionately and evenhandedly dispensed. Such a responsibility and commitment can be no less when the penalty is most extreme. [Sotto voce: But it is less.]" To read the solemn judicial pronouncements of a State's highest court

in this manner is an indefensible canard.

We therefore start with the proposition that the California Supreme Court meant what it said when it spoke in Jackson of "the form of proportionality review which Frierson assures will be available (based upon the three-pronged test of In re Lynch)," 28 Cal.3d at 317, 618 P.2d at 177, 168 Cal. Rptr. at 631.[26/] This assurance of appellate review of the substantive fitness of a

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26/ No doubt the scope of this review -- and in particular the question to what extent an application of the second prong of Lynch requires cross-case factual comparisons -- remains unresolved in the California Supreme Court. Justice Kaus' Easley opinion demonstrates as much. But, while Justice Kaus has raised the issues whether and what type of proportionality review should be provided "if ... the Lynch approach is inadequate," see page 40 supra, he has not questioned that the California Supreme Court is committed at the least to proportionality review of death sentences under Lynch. For him, the open questions relate to "the specific form of such review that will be undertaken." See page 38 supra. Those questions are without consequence in the present case, since it is indisputable that Harris has been give no substantive review of his death sentence, of any sort.

death sentence invokes Fourteenth Amendment due process protection whether or not it is required by the Eighth. "We have repeatedly held that state [law] ... may create ... interests that are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment." Vitek v. Jones, 445 U.S. 480, 488 (1980). See, e.g., Goss v. Lopez, 419 U.S. 565, 572-574 (1975); Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 1, 12 (1979); Connecticut Board of Pardons v. Dumschat, 452 U.S. 458, 463 (1981). "Once a State has [created a right of this sort] ..., due process protections are necessary 'to insure that the state-created right is not arbitrarily abrogated.'" Vitek v. Jones, supra, 445 U.S. at 488-89. For, "[t]he touchstone of due process is the protection of the individual against

arbitrary action of government." Wolff v. McDonnell, 418 U.S. 539, 558 (1974). See also Yick Wo v. Hopkins, 118 U.S. 356, 369-370 (1886); Schware v. Board of Bar Examiners, 353 U.S. 232, 239 (1957). Thus it is that "an arbitrary disregard of [a state-created right] ... is a denial of due process of law." Hicks v. Oklahoma, 447 U.S. 343, 346 (1980).

Among the sorts of rights commanding due process protection, although originating in state law, are rights of "potential litigants [to invoke the] use of established adjudicatory procedures." Logan v. Zimmerman Brush Co., 455 U.S. 422, 429 (1982)(state-created right to administrative forum); see also Hicks v. Oklahoma, supra (state-created right to jury determination of criminal sentence). A state appellate court may not deny a litigant recourse to such procedures arbitrarily. Ibid. Even where a mere

chose in action is concerned, "[a]s our decisions have emphasized time and again, the Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged." Logan v. Zimmerman Brush Co., supra, 455 U.S. at 433; see also United States ex. rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954).

The application of these principles here requires no elaborate reasoning. An adjudicatory procedure which provides condemned persons with a substantive appellate review of the fitness of their death sentences before they are executed constitutes a material right. Its materiality is not diminished by the fact that it originates in state law, or by the fact that its precise contours are still in the process of development by the California Supreme Court. To the con-

trary, the fact that that court is still developing the scope of the right as a matter of state law underlines the importance to each condemned person of receiving the considered judgment of the California Supreme Court upon the propriety of the death sentence in his or her individual case. Whatever the exact extent of that review, it entails at least an independent evaluation, by dispassionate judges of statewide jurisdiction and experience, of the appropriateness of a death sentence decreed by a local jury. This much was plainly vouchsafed by the California Supreme Court, not as a matter of grace, but as a matter of "well established proportionality principles of general application," People v. Frierson, supra, 25 Cal.3d at 183, 599 P.2d at 611, 158 Cal. Rptr. at 305. It may not be arbitrarily denied consistent with due process.

Nor should Pulley's attempt to cast this Court in the role of the California Supreme Court by asking this Court to pass its own judgment on the fitness of Harris' death sentence for his crime (Pet. Br. 46-47) be countenanced. See Eddings v. Oklahoma, 455 U.S. 104, 117 (1982). The primary responsibility for that judgment lies with the California Court, where the Ninth Circuit has correctly placed it.

III. THE DECISION OF THE EIGHTH AMENDMENT ISSUE BELOW SHOULD BE AFFIRMED

While the Eighth Amendment issue is unnecessary to the disposition of this case, its decision by the Ninth Circuit was correct on the merits.

Pulley's primary submission here is that this Court's repeated and extended references to meaningful appellate review

of death sentences in Gregg v. Georgia, 428 U.S. 153, 166-168, 195, 198, 204-207 (1976)(lead opinion); id. at 211-212, 222-224 (opinion of Justice White); Proffitt v. Florida, 428 U.S. 242, 250-251, 253, 258-260 (1976)(lead opinion); and Jurek v. Texas, 428 U.S. 262, 269-270, 276 (1976)(lead opinion), were mere surplusage -- "merely frosting on an already constitutional cake" (Pet. Br. 25). We may readily agree that in Gregg the Court spoke of "the further safeguard of meaningful appellate review ... to ensure that death sentences are not imposed capriciously or in a freakish manner," 428 U.S. at 195 (emphasis added), and that in Proffitt it prefaced a description of the Florida appellate-review procedure (in which "[sentencing] decisions are reviewed to ensure that they are consistent with other sentences imposed in similar circumstances") with the

word "[m]oreover," 428 U.S. at 253.[27] However, Woodson v. North Carolina, 428 U.S. 280, 303 (1976)(lead opinion), unmistakably described "Furman's basic requirement" as "replacing arbitrary and wanton jury discretion with objective

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27/ Pulley says that Jurek sustained a capital sentencing scheme in which "no consideration whatsoever was given to any form of 'proportionality review.'" Pet. Br. 27. The fact is that, at the time of Jurek, the scope of sentence review by the Texas Court of Criminal Appeals was quite unclear. See 428 U.S. at 270. The Court of Criminal Appeals had construed the Texas statute in a fashion -- hardly compelled by the statutory language -- which permitted the introduction of "whatever evidence of mitigating circumstances the defense can bring [out]," 428 U.S. at 273. This evidence, together with evidence in aggravation, was to be considered in connection with the crucial statutory question "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society," see 428 U.S. at 269, 272-273. Since the question of probability is always one of degree, a review of "the sufficiency of the evidence to see if a 'yes' answer to [this] question ... should be sustained," 428 U.S. at 273, would obviously be expected to involve cross-case comparisons and to evolve a precedential base for them, over the course of repeated decisions by an appellate court following stare decisis principles. In determining whether a sufficient probability of future dangerousness had been established in any particular case, the reviewing court could hardly do otherwise than to

standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death" (emphasis added). Accord: Godfrey v. Georgia, 446 U.S. 420, 428 (1980)(plurality opinion). It would be a remarkable Eighth Amendment that required "reviewability" without requiring review. The Court's opinions countenance no such anomaly. [Stanislaus] Roberts v. Louisiana, 428 U.S. 325,

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27/ continued

look to the facts of earlier cases in which it had held that a sufficient probability was or was not established. See note 29 infra. Doubtless, this is what the lead opinion in Jurek meant when it relied upon "judicial review of the jury's decision in a court with statewide jurisdiction" as providing "a means to promote the evenhanded, rational, and consistent imposition of death sentences under law." 428 U.S. at 276. In any event, as the Court has since pointed out, its 1976 examination of the statutes then before it "did not lead us to examine all of [their] ... nuances." Zant v. Stephens, 456 U.S. 410, 414 (1982)(per curiam)(opinion certifying question). The lead opinion in Jurek was quite explicit concerning the limitations of what was then known about the way in which the Texas statute might subsequently be construed and administered. 428 U.S. at 270, 272 n.7.

335-336 (1976)(plurality opinion)("[a]s in North Carolina, there are no standards provided to guide the jury in the exercise of its power to select those first-degree murderers who will receive death sentences, and there is no meaningful appellate review of the jury's decision"); Zant v. Stephens, 456 U.S. 410, 413 (1982)(per curiam)(opinion certifying question) ("[w]e recognized that the constitutionality of Georgia death sentences ultimately would depend on the Georgia Supreme Court's construing the statute and reviewing capital sentences consistently with [Furman's] ... concern").

But, if the question of the constitutionally requisite nature of appellate sentencing review in death cases was ever open, it no longer is. Explicating Gregg in Zant v. Stephens, 51 U.S.L.W. 4891

(U.S., June 22, 1983), the Court last Term made unmistakably clear that the Gregg "plurality's approval of Georgia's capital sentencing procedure rested primarily on two features of the scheme: that the jury was required to find at least one valid statutory aggravating circumstance and to identify it in writing, and that the state supreme court reviewed the record of every death penalty proceeding to determine whether the sentence was arbitrary or disproportionate." Id. at 4894; see also id. at 4895 & n.19. Under California capital-sentencing practice, the discretion of juries to impose or withhold a death sentence at the trial level is at least as unconstrained as that of Georgia juries. (Compare the description of California's trial procedure at pages 18-25 supra with the description of Georgia's in Zant, 51 U.S.L.W. at 4893-4894, 4897-4898.)

Therefore, the Court's conclusion in Zant regarding the constitutional necessity for appellate review under the Georgia scheme is equally decisive here:

> "Our decision in this case depends in part on the existence of an important procedural safeguard, the mandatory appellate review of each death sentence by the Georgia Supreme Court to avoid arbitrariness and to assure proportionality. We [have] ... been assured that a death sentence will be set aside if the invalidation of an aggravating circumstance makes the penalty arbitrary or capricious. ... As we noted in Gregg, 428 U.S., at 204-205, we have also been assured that a death sentence will be vacated if it is excessive or substantially disproportionate to the penalties that have been imposed under similar circumstances." (Id. at 4898.)

See also Barclay v. Florida, 51 U.S.L.W. 5206, 5211 (U.S., July 6, 1983)(plurality opinion); id. at 5211, 5215 (concurring opinion of Justice Stevens, referring, inter alia, to the Florida Supreme Court's "constitutionally-mandated responsibility

to perform meaningful appellate review," ibid.); California v. Ramos, 51 U.S.L.W. 5220, 5222 (U.S., July 6, 1983)(in Gregg, the lead opinion concluded that the Georgia scheme "met the concerns of Furman by providing a bifurcated proceeding, instruction on the factors to be considered, and meaningful appellate review of each death sentence"). Plainly, "meaningful appellate review of each death sentence" is an Eighth Amendment necessity.

The rule could not be otherwise. For the whole body of this Court's "Eighth Amendment decisions in the past decade [is] ... concerned with insuring that sentencing discretion in capital cases is channelled so that arbitrary and capricious results are avoided." Hopper v. Evans, 456 U.S. 605, 611 (1982). They cannot be avoided if broad discretionary sentencing authority is given isolated

juries, each convened to hear a single case, and if their choice of death as punishment in that one case remains unchecked and unexamined by review procedures which compare the outcome in each case with others. 28/ Absent such appellate review, there can be no assurance "that capital punishment [will] be imposed fairly, and with reasonable consistency," as the Eighth Amendment requires. Eddings v. Oklahoma, supra, 455 U.S. at 112. In Gardner v. Florida, 430

28/ See Gregg v. Georgia, supra, 428 U.S. at 206 (lead opinion):

> "The provision for appellate review in the Georgia capital-sentencing system serves as a check against the random or arbitrary imposition of the death penalty. In particular, the proportionality review substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury. If a time comes when juries generally do not impose the death sentence in a certain kind of murder case, the appellate review procedures assure that no defendant convicted under such circumstances will suffer a sentence of death."

U.S. 349, 361 (1977)(plurality opinion), an omission from the appellate record of information used to impose a death sentence was recognized as rendering a "capital-sentencing procedure ... subject to the defects which resulted in the holding of unconstitutionality in Furman...." Can less be said of the omission of any substantive appellate review at all?

Pulley argues that there is no need for such review because a "presumptively valid" capital-sentencing procedure at the trial level produces "death judgments [that] ... are presumptively free of arbitrariness and caprice" (Pet. Br. 36), leaving a mere "hypothetical possibility of an occasionally disproportionate result" (Pet. Br. 39-40). See Pet. Br. 35-40. This argument founders legally in the wake of Zant's recognition that appellate review is one of the conditions

of a presumptively valid capital sentencing procedure. Pages 68-70 supra. But the deeper vice of the argument is its disregard for fact. Even a cursory reading of the appellate reports demonstrates that the "hypothetical possibility" of a disproportionate death sentence under a presumptively valid trial-level procedure is far from "hypothetical."29/

29/ In the following two dozen cases, among others, state appellate courts have found disproportionate, and therefore reduced, death sentences imposed under "presumptively valid" capital-sentencing procedures. Cases in which the appellate court disagreed with the sentencer's assessment of the relative weight of aggravating and mitigating circumstances in the particular case, without explicitly comparing the facts of the case to those in other cases, are designated "(a/m)." Cases in which the appellate court compared the appellant's sentence to those of co-participants in the same crime are designated "(co-p)." Cases in which the appellate court compared the appellant's sentence to those in unrelated cases are designated "(uc)." Florida cases in which the appellate result was affected in part by the fact that a jury had recommended a life sentence but had been overriden by the sentencing judge are designated "(j)." Under the unique Texas statute (see note 27 supra), the method for declaring a death sentence disproportionate is to find the evidence insuffici-

Pulley's related argument that state appellate review should not be constitu-

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29/ continued

ent to support a "yes" answer to the probability-of-future-dangerousness question, after comparing that evidence with the evidence in other cases where a "yes" answer was found supported or unsupported.

State v. Brookover, 124 Ariz. 38, 39-42, 601 P.2d 1322, 1323-1326 (1979)(a/m)
State v. Valencia, 132 Ariz. 248, 250-251, 645 P.d 239, 241-242 (1982)(a/m)
State v. Graham, ____ Ariz. ____, ____, 660 P.2d 460, 463-464 (1983)(a/m)
Giles v. State, 261 Ark. 413, 420-425, 549 S.W.2d 479, 483-485 (1977)(a/m)
Sumlin v. State, 273 Ark. 185, 190, 617 S.W.2d 372, 375 (1981)(co-p)(uc)
Henry v. State, 278 Ark. 478, 488-489, 647 S.W.2d 419, 425 (1983)(uc)
Slater v. State, 316 So.2d 539, 542-543 (Fla. 1975) (co-p)
Swan v. State, 322 So.2d 485, 489 (Fla. 1975)(a/m)(j)
Halliwell v. State, 323 So.2d 557, 561-562 (Fla. 1975) (a/m)
Provence v. State, 337 So.2d 783, 786-787 (Fla. 1976) (uc)(j)
McCaskill v. State, 344 So.2d 1276, 1278-1280 (Fla. 1977) (uc)(j)
Malloy v. State, 382 So.2d 1190, 1192-1193 (Fla. 1979) (co-p)(j)
Neary v. State, 384 So.2d 881, 885-888 (Fla. 1980) (co-p)(j)
Goodwin v. State, 405 So.2d 170, 172 (Fla. 1981)(a/m) (j)

[footnote continued on next page]

tionally required because federal habeas corpus is a sufficient "'safety net'" against disproportionate death sentences (Pet. Br. 38-40) fares no better. It stands every elementary tenet of federalism on its head.30/

29/ continued

Blair v. State, 406 So.2d 1103, 1108-1109 (Fla. 1981) (uc)
People v. Carlson, 79 Ill.2d 564, 587-591, 404 N.E.2d 233, 243-245 (1980)(a/m)
People v. Gleckler, 82 Ill.2d 145, 161-171, 411 N.E.2d 849, 856-861 (1980)(co-p)(uc)
Coleman v. State, 378 So.2d 640, 649-650 (Miss. 1979)(uc)
State v. McIlvoy, 629 S.W.2d 333, 341-342 (Mo. 1982) (co-p)(uc)
Burrows v. State, 640 P.2d 533, 552-553 (Okla. Crim. App. 1982)(a/m)
Munn v. State, 658 P.2d 482, 487-488 (Okla. Crim. App. 1983)(uc)
Wallace v. State, 618 S.W.2d 67, 68-69 (Tex. Crim. App. 1981)(uc)
Roney v. State, 632 S.W.2d 598, 601-603 (Tex. Crim. App. 1982)(uc)
Garcia v. State, 626 S.W.2d 46, 48-52 (Tex. Crim. App. 1982)(uc)

30/ Federal habeas corpus is not designed as a means for the regular and systematic review of state criminal judgments, to ensure their consistency and evenhandedness. "[I]t is designed to

Finally Pulley argues that, "[i]n terms of its impact on the judiciary, the proposal [that state appellate courts

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30/ continued

guard against extreme malfunctions in the state criminal justice systems." Jackson v. Virginia, 443 U.S. 307, 332 n.5 (1979)(concurring opinion of Justice Stevens). It reaches only "the occasional abuse." Id. at 322 (majority opinion). "[D]irect appeal is the primary avenue for review of a conviction or sentence, and death penalty cases are no exception. ... The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited." Barefoot v. Estelle, 51 U.S.L.W. 5189, 5191 (U.S., July 6, 1983). See, classically, Ex parte Royall, 117 U.S. 241, 251 (1886). Proportionality review of death sentences implicates several admixed interests: the "State's interest in enforcing its criminal laws," Arizona v. Manypenny, 451 U.S. 232, 243 (1981); see, e.g., Engle v. Isaac, 456 U.S. 107, 128 (1982); the State's interest in assuring the regularity and consistency of the judgments of its own tribunals (as reflected, for example, in the "well established proportionality principles of general application" which the Frierson opinion drew from In re Lynch, see pages 30-31 supra); and the state and federal constitutional rights of the death-sentenced appellant. It is for the state appellate courts in the first instance to "mediate federal constitutional concerns and [these] state interests," Moore v. Sims, 442 U.S. 415, 430 (1979). See, e.g., Schlesinger v. Councilman, 420 U.S. 738, 755-756 (1975); Trainor v. Hernandez, 431 U.S. 434, 443 (1977). A State's judicial system would be given neither the opportunity to oversee "the informed evolution of state

review the proportionality of death sentences] is staggering" (Pet. Br. 21) because of "the enormously burdensome factual review envisioned by the Ninth Circuit" (Pet. Br. 39). There are two answers to this.

First, the overwhelming consensus of the States today is that the task of reviewing the proportionality of death sentences is not too "burdensome" for their appellate courts. Thirty-six States other than California have discretionary death-penalty statutes. In two of these, the availability of proportionality review is presently unclear. The remain-

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policy by state tribunals," Moore v. Sims, supra, 442 U.S. at 430, nor "the opportunity to resolve federal issues arising in its courts if a federal district court were permitted to substitute itself for the State's appellate courts," Huffman v. Pursue, 420 U.S. 592, 609 (1975). See Bellotti v. Baird, 428 U.S. 132, 146-147 (1976), and cases cited.

ing thirty-four jurisdictions provide for some form of appellate proportionality review -- twenty-eight by statute, and six by judicial decision. In all but one (or possibly two) of the latter thirty-four jurisdictions, the proportionality review which is undertaken involves a comparison of the sentence in the case at bar with sentences in other cases. 31/ Moreover,

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31/ The States are catalogued in Appendix A infra, which cites the relevant statute or leading judicial decision in each. Twelve States have no death penalty: Alaska, Hawaii, Iowa, Kansas, Maine, Michigan, Minnesota, North Dakota, Oregon, Rhode Island, West Virginia, and Wisconsin. New York has none except a mandatory death penalty for murder by life-sentenced inmates, presently under constitutional challenge. The two capital-punishment States in which the availability of appellate proportionality review is presently unclear are Utah and Vermont. The six capital-punishment States in which proportionality review is a product of judicial decision rather than statute are Arizona, Arkansas, Florida, Illinois, Indiana, and Texas. Indiana is the only State in which the form of proportionality review provided appears to be limited to an assessment of the fitness of the death penalty on the facts of record in the case at bar, without comparison to other cases. The text above lists "possibly two" States in this category because Colorado law is silent on the issue.

California itself provides an elaborate form of state-wide comparative review of non-capital criminal sentences under the Uniform Determinate Sentencing Act, enacted in 1976. Finding in this statute that the purpose of punishment "is best served by terms proportionate to the seriousness of the offense with provision for uniformity in the sentences of offenders committing the same offense under similar circumstances," Cal. Penal Code § 1170(a)(1)(West 1983 cum. pocket part), the Legislature furnished sentencing judges with detailed statutory and administrative guidelines for the initial determination of sentence.[32/] It

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32/ See Cal. Penal Code §§ 1170(a)(2) - 1170.8 (West 1983 cum. pocket part); Cal. Civil and Criminal Court Rules 401-453 (West 1981)("Sentencing Rules for the Superior Courts"). The statute (3 Cal. Stats. 1976, ch. 1139, pp. 5061-5178) provides that virtually all nontrivial criminal offenses are punishable by one of three specified periods of imprisonment (e.g., "two, three, or five years"); it provides that judges shall impose the middle term unless there are circumstances in aggravation or mitigation warranting the upper or

was nonetheless concerned that sentencing disparity would continue unless a statewide comparative-review mechanism was established, and it therefore provided that:

> "In all cases the [Board of Prison Terms] ... shall, not later than one year after the commencement of the term of imprisonment, review the sentence and shall by motion recommend that the court recall the sentence ... and resentence the defendant ... if the board determines the sentence is disparate. The review under this section shall ... apply the sentencing rules of the Judicial Council and the information regarding the sentences in this state of other persons convicted of similar crimes so as to eliminate disparity of sentences and to promote uniformity of sentencing." 33/

32/ continued

lower terms respectively; it supplies rules for enhancement of this base term under certain circumstances, and for the computation of sentence in the event of conviction for more than one offense; and it requires the Judicial Council to "seek to promote uniformity of sentencing under Section 1170, by ... [t]he adoption of rules providing criteria for the consideration of the trial judge at the time of sentencing ...," § 1170.3. The Rules cited above are promulgated pursuant to this requirement.

33/ Former Cal. Penal Code § 1170(f). The quoted

Pursuant to this mandate,

> "[t]he Board has gathered information on the DSL [Determinate Sentencing Law] sentences imposed in this state. This information includes data on each DSL prisoner's criminal history, his social history, the circumstances of the offense, and the sentence itself.
>
> Utilizing this information, the Board undertakes a three-step process to identify 'disparate' sentences. First, the Board identifies other cases to which the subject case is similar. Second, the Board uses statistical analysis to identify 'variant' cases; that is, cases that do not conform to an 'observed sentencing pattern' occurring within

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33/ continued

language is that enacted by 1 Cal. Stats. 1977, ch. 165, § 15, pages 647, 649, except that the "Board of Prison Terms" has been substituted for the agency previously involved. Amendments of the statute between 1979 and 1981 have changed it considerably, but not in any particular that is presently relevant. The current form appears as Penal Code § 1170(f) in the West 1983 cumulative pocket part.

Justice Kaus, in his Easley opinion (pages 36-41 supra), noted: "To my knowledge, neither Frierson, Jackson nor any other decision of this court has considered what effect -- if any -- the existence of this statutory procedure has on the question of proportionality review in capital cases." People v. Easley, supra, 654 P.2d at 1294 n.7, 187 Cal. Rptr. at 766 n.7.

the cases grouped as 'similar'. These variant cases are distinguished from 'nonvariant cases' (those cases which do conform to an observed sentencing pattern occurring within the cases grouped as similar). In the third step of the process, the variant cases are examined on a case by case basis to determine if there are other factors present in those cases (not taken into account in the original statistical analysis) that would explain or justify the more severe sentence. If no additional aggravating circumstances are identified, the Board, in its discretion, can find that the sentence is 'disparate' ..." (People v. Herrera, 127 Cal. App.3d 590, 597-598, 179 Cal. Rptr. 694, 698-699 (1982).)

* * *

"The entire sentence review process is based on a data base of more than 37,000 cases reviewed by the end of 1982. The data base is carefully and extensively edited for accuracy. It contains detailed charging, conviction, and sentencing information, socioeconomic information about the offender, criminal justice system background information, and information about victims of crime. ..." (CALIFORNIA YOUTH AND ADULT CORRECTIONAL AGENCY, BOARD OF PRISON TERMS, REPORT ON SENTENCING PRACTICES -- DETERMINATE SENTENCING LAW, 5 (February 10, 1983).)

Surely, a State which has a procedure of this sort in place for the review of scores of thousands of non-capital sentences in the interest of uniformity of criminal punishment should not find it too "burdensome" to provide some means for proportionality review in the relative handful of cases where life is at stake.

The second answer to Pulley's complaint about the burdensomeness of the "factual review envisioned by the Ninth Circuit" (Pet. Br. 39) is that the Ninth Circuit's decision envisions no particular form of proportionality review of death sentences, leaving the questions of scope and method of review entirely to the California Supreme Court. See pages 48-50 supra. The California Supreme Court seems presently to be pondering those questions. See pages 36-42 supra. The review procedures which it may choose to adopt are not now foreseeable; to talk about their bur-

densomeness vel non beforehand is entirely rash and necessarily ill-informed. Both the Eighth Amendment and the Ninth Circuit give the California Supreme Court ample flexibility to design a mode of review which is within California's means and suitable to its particular needs.

All that proportionality review, as envisioned by the Ninth Circuit, means is some method of appellate review that "serves as a check against the random or arbitrary imposition of the death penalty," that "eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury," and that assures that, "[i]f a time comes when juries generally do not impose the death sentence in a certain kind of murder case, ... no defendant convicted under such circumstances will suffer a sentence of death." Gregg v. Georgia, supra, 428 U.S. at 206 (lead opinion). The standards

and processes of review to this end can be shaped by the California Supreme Court as it sees fit.

For that same reason, it would be utterly inappropriate for this Court to accept Pulley's invitation to make an independent determination of first impression that, "if the facts of [Harris'] ... case do not justify the death penalty, no case will." (Pet. Br. 47.) That judgment is within the initial province of the California Supreme Court, which has not yet undertaken to compare Harris' case with any other case, or to review the substantive fitness of Harris' death sentence in any way. See note 25 supra.[34/] Despite the "fact that this issue has

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34/ Pulley implies doubt as to whether "any ... similar cases [to Harris'] can be found" (Pet. Br. 47). There is no doubt. The record herein contains no reference to such cases, because the district court below permitted no record to be made on this or any other issue in the case. See pages 9, 10-12, 47-48 supra. In Appendix B infra we set

proceeded through all available courts (some of them two and three times)" (Pet. Br. 15), the only judgments so far made as to the substantive propriety of a sentence of death for Robert Alton Harris were those made by his sentencing jury and trial judge. Those are not judgments which this Court should review in the first instance. Rather, as the Ninth Circuit correctly held, it is the constitutional obligation of the California Supreme Court to review them first.

CONCLUSION

The judgment below should be affirmed.

34/ continued

out brief summaries of the facts of several aggravated multiple-murder cases in which the prosecution sought the death penalty but the sentencing jury or judge declined to impose it.

Respectfully submitted,

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APPENDIX

APPENDIX A

PROPORTIONALITY REVIEW PROVISIONS OF STATE LAW

Unless otherwise noted, the following statutes or judicial decisions provide for appellate review of the proportionality of death sentences, including a comparison of the facts of the case at bar with others. In States where no statutory citation is set out below, proportionality review is the product of judicial decisions. Only the leading case in each jurisdiction is cited.

Alabama

Ala. Code § 13A-5-53 (1982)

Alaska

No death penalty

Arizona

State v. Richmond, 114 Ariz. 186, 196, 560 P.2d 41, 51 (1976)

Arkansas

Collins v. State, 261 Ark. 195, 221-222, 548 S.W.2d 106, 120-121 (1977)

California

Sub judice

Colorado

The statute, Colo. Rev. Stat. Ann. § 16-11-103(7)(a), (b) (1982 cum. pocket part) provides for review of the substantive propriety of each death sentence, but is silent on the subject of comparative methodology. See also Colo. Appellate Rule 4(e)(1)(1982 cum. pocket part). The Colorado Supreme Court has not yet spoken to the issues of scope and method of review.

Connecticut

Conn. Gen. Stat. Ann. § 53a-46b(b) (1982 supp.)

Delaware

Del. Code Ann., tit. 11, § 4209(g)(2) (1979)

Florida

State v. Dixon, 283 So.2d 1, 10 (Fla. 1973)

Georgia

Ga. Code Ann. § 17-10-35(e) (1982)

Hawaii

No death penalty

Idaho

Idaho Code Ann. § 19-2827(c) (1979)

Illinois

People v. Gleckler, 82 Il1.2d 145, 161-171, 411 N.E.2d 849, 856-861 (1980)

Indiana

Proportionality review is apparently limited to consideration of the facts of the case at bar, without comparison to other cases. Williams v. State, ____ Ind. ____, _____, 430 N.E.2d 759, 764-768 (1982).

Iowa

No death penalty

Kansas

No death penalty

Kentucky

Ky. Rev. Stat. Ann. § 532.075(3) (1982 cum. pocket part)

Louisiana

La. Sup. Ct. Rule 905.9.1, § 1, applicable to La. Code Crim. Pro. Ann., art. 905.9 (West 1982 cum. pocket part)

Maine

No death penalty

Maryland

Md. Code Ann., art. 27, § 414(e) (1982)

Massachusetts

Mass. Gen. Laws Ann., ch. 279, § 71 (1982 cum.pocket part)

Michigan

No death penalty

Minnesota

No death penalty

Mississippi

Miss. Code Ann. § 99-19-105(3)(1982 cum. pocket part)

Missouri

Mo. Stat. Ann. § 565.014(3) (Vernon 1979)

Montana

Mont. Code Ann. § 46-18-310 (1981)

Nebraska

Neb. Rev. Stat. Ann. §§ 29-2521.01(5), 29-2521.03 (1979)

Nevada

Nev. Rev. Stat. § 177.055(2) (1981)

New Hampshire

N.H. Rev. Stat. Ann. § 630.5 (VII) (1981 supp.)

New Jersey

N.J. Stat. Ann. § 2C:11-3(e) (1982)

New Mexico

N.M. Stat. Ann. § 31-20A-4(C)(1981 repl. pamphlet)

New York

No death penalty, except for a mandatory death sentence applicable to murder by a life-term inmate (presently under constitutional challenge)

North Carolina

N.C. Gen. Stat. Ann. § 15A-2000(d)(2) (1978)

North Dakota

No death penalty

Ohio

Ohio Rev. Code Ann. § 2929.05(A) (Page 1982)

Oklahoma

Okla. Stat. Ann., tit. 21, § 701.13(C) (1981)

Oregon

No death penalty

Pennsylvania

Pa. Stat. Ann., tit. 42, § 9711(h)(3) (Purdon 1982)

Rhode Island

No death penalty

South Carolina

S.C. Code Ann. § 16-3-25(C) (1982 supp.)

South Dakota

S.D. Codified Laws Ann. § 23A-27A-12 (1979)

Tennessee

Tenn. Code Ann. § 39-2-205(c) (1982)

Texas

Roney v. State, 632 S.W.2d 598, 601-603 (Tex. Crim. App. 1982) (see notes 27, 29 to the body of this brief)

Utah

The statute, Utah Code Ann. § 76-3-206(2) (1978), is silent on the subject of the scope of appellate review of death sentences. See also Utah Code Ann. § 76-3-207(3) (1978). A general constructional provision of the penal code, Utah Code Ann. § 76-1-104(3) (1978), may support proportionality review. The Utah Supreme Court has appeared

Utah (continued)

to say that it considers claims of disproportionality, but its decisions must be considered ambiguous in this regard. See State v. Pierre, 572 P.2d 1338, 1355 (Utah 1977); State v. Wood, 648 P.2d 71, 77 (Utah 1982).

Vermont

Vermont's death-penalty statute, Vt. Stat. Ann., tit. 13, § 2303(c) (1982 cum. pocket part), predates Furman and has not been considered by the Supreme Court of Vermont since Furman. (It authorizes capital punishment only for the first-degree murder of correctional personnel.)

Virginia

Va. Code 1950 § 17-110.1(C)(1982 repl. vol.)

Washington

Wash. Rev. Code Ann. § 10.95.130(2) (1983 cum. pocket part)

West Virginia

No death penalty

Wisconsin

No death penalty

Wyoming

Wyo. Stat. Ann. § 6-2-103(d)(1983)

APPENDIX B

MULTIPLE-MURDER DEFENDANTS NOT SENTENCED TO DEATH

In the following California cases where first-degree murder and special circumstances were found, the prosecution asked for the death penalty but the sentencing jury or judge refused to impose it:

(1) Brown. Four-day crime spree including six burglaries, one involving the killing of the homeowner, another involving a forcible rape/oral-copulation/robbery, and finally a rape of an acquaintance in her home, on the floor next to her boyfriend's body, after the defendant had shot the boyfriend dead. Defense: smoking PCP throughout the four-day period. Prior aggravated assault and rape-murder in Wisconsin introduced at penalty phase. [Jury sentenced to life

without parole.] (People v. Leonard Brown, Los Angeles Cty. Super. Ct. No. A020840.)

(2) Caywood. Robbery-murder of gas station operator and employee, both killed by short-range shots to the back of the head. Defendant also worked at the station. Prior Illinois robbery and California involuntary manslaughter (defendant overdosed victim and then dumped body in the woods) introduced at penalty phase. [Jury hung on penalty; parties stipulated that judge should then determine penalty; judge sentenced to life without parole.] (People v. William Caywood, Orange Cty. Super. Ct. No. C45603.)

(3) Jordan. Three separate multiple-robbery incidents culminating in a double murder during the last robbery. Defendant had served a prison term for assault with

a deadly weapon. [Two successive juries hung on penalty; judge then sentenced to life without parole under Briggs Initiative.] (People v. Kenneth Jordan, Los Angeles Super. Ct. No. A357550.)

(4) Marler. Killing of gas station attendant while the defendant was a fugitive following two Washington State murders of persons related to the defendant's girlfriend. The Washington murders and an "extensive criminal record" including assault and theft convictions were considered by the sentencing judge. [Judge sentenced to life without parole.] (People v. Clyde Marler, Shasta Cty. Super. Ct. No. 67324.)

(5) Matlock. Four-day crime spree including four robbery-murders (of two used car lot employees, a pharmacy employee, and a restaurant owner shot execution-style), as well as the non-fatal

shooting of another street-robbery victim in the back of the head. Extensive criminal record: multiple theft arrests since age 11 (defendant was 23 at the time of the murders), adult prison term for assault with a deadly weapon, escape, robbery. Defendant had been released from prison 3-1/2 months before the subject crime spree. [Jury sentenced to life without parole.] (People v. Mark Matlock, Los Angeles Cty. Super. Ct. No. A338952.)

(6) Roberts. Burglary murder of homeowner and his daughter, for whom defendant had previously done yard work. Defendant stalked the victims at their house for some time prior to the killings, with the intention of killing them. After shooting the daughter, the defendant "spontaneously" committed necrophilia. Defendant admitted another homicide

to police. [Jury hung on penalty; judge then sentenced to life without parole under 1977 statute.] (People v. Paul Roberts, San Bernardino Cty. Super. Ct. No. SCR 35302.)

(7) Thomas. Execution-style murders of four people, including a 2-year-old girl, apparently in retaliation for a slight received in a family feud. Prior prison term for armed robbery. Mitigation: excellent work record in the recent past; two codefendants also spared the death penalty. [Jury sentenced to life without parole.] (People v. Willie Thomas, Los Angeles Cty. Super. Ct. No. A018108.)

(8) White. Three separate killings, all related to narcotics sales. Extensive criminal record including a number of prior felonies (none violent). [Jury sentenced to life without parole.] (People v. Freddie White, Alameda Cty. Super. Ct. Nos. 68512, 68513.)

(9) Zimmerman. Axe murders of 18-year-old boy and his 12-year-old sister during a burglary. The girl was raped and sodomized. Prior burglary conviction. [Jury hung on penalty; judge then sentenced to life without parole under 1977 statute.] (People v. John Zimmerman, Los Angeles Cty. Super. Ct. No. A077363.)

APPENDIX C

EXCERPTS FROM FORMER CALIFORNIA PENAL CODE §§ 190 - 190.4

Penal Code § 190

190. Every person guilty of murder in the first degree shall suffer death, confinement in state prison for life without possibility of parole, or confinement in state prison for life. The penalty to be applied shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4, and 190.5. Every person guilty of murder in the second degree is punishable by imprisonment in the state prison for five, six, or seven years.

Penal Code § 190.1

190.1. A case in which the death penalty may be imposed pursuant to this chapter shall be tried in separate phases as follows:

(a) The defendant's guilt shall first be determined. If the trier of fact finds the defendant guilty of first degree murder, it shall at the same time determine the truth of all special circumstances charged as enumerated in Section 190.2, except for a special circumstance charged pursuant to paragraph (5) of subdivision (c) of Section 190.2 where it is alleged that the defendant had been convicted in a prior proceeding of the offense of murder of the first or second degree.

(b) If the defendant is found guilty of first degree murder and one of the special circumstances is charged pursuant to paragraph (5) of subdivision (c) of Section 190.2 which charges that the defendant had been convicted in a prior proceeding of the offense of murder of the first or second degree, there shall thereupon be further proceedings on the question of the truth of such special circumstance.

(c) If the defendant is found guilty of first degree murder and one or more special circumstances as enumerated in Section 190.2 has been charged and found to be true, his sanity on any plea of not guilty by reason of insanity under Section 1026 shall be determined as provided in Section 190.4. If he is found to be sane, there shall thereupon be further proceedings on the question of the penalty to be imposed. Such proceedings shall be conducted in accordance with the provisions of Sections 190.3 and 190.4.

Penal Code § 190.2

190.2. The penalty for a defendant found guilty of murder in the first degree shall be death or confinement in the state prison for life without possibility of parole in any case in which one or more of the following special circumstances has been charged and specially found, in a proceeding under Section 190.4, to be true:

(a) The murder was intentional and was carried out pursuant to agreement by the person who committed the murder to accept a valuable consideration for the act of murder from any person other than the victim;

(b) The defendant, with the intent to cause death, physically aided or committed such act or acts causing death, and the murder was willful, deliberate, and premeditated, and was perpetrated by means of a destructive device or explosive;

(c) The defendant was personally present during the commission of the act or acts causing death, and with intent to cause death physically aided or committed such act or acts causing death and any of the following additional circumstances exists:

(1) The victim is a peace officer as defined in Section 830.1, subdivision (a) or (b) of Section 830.2, subdivision (a) or (b) of Section 830.3, or subdivision (b) of Section 830.5, who, while engaged in the performance of his duty was intentionally killed, and the defendant knew or reasonably should have known that such victim was a peace officer engaged in the performance of his duties.

(2) The murder was willful, deliberate, and premeditated; the victim was a witness to a crime who was intentionally killed for the purpose of preventing his testimony in any criminal proceeding; and the killing was not committed during the commission or attempted commission of the crime to which he was a witness.

(3) The murder was willful, deliberate, and premeditated and was committed during the commission or attempted commission of any of the following crimes:

(i) Robbery in violation of Section 211;

(ii) Kidnapping in violation of Section 207 or 209. Brief movements of a victim which are merely incidental to the commission of another offense and which do not substantially increase the victims's risk of harm over that necessarily inherent in the other offense do not constitute a violation of Section 209 within the meaning of this paragraph.

(iii) Rape by force or violence in violation of subdivision (2) of Section 261; or by threat of great and immediate bodily harm in violation of subdivision (3) of Section 261;

(iv) The performance of a lewd or lascivious act upon the person of a child under the age of 14 years in violation of Section 288;

(v) Burglary in violation of subdivision (1) of Section 460 of an inhabited dwelling house with an intent to commit grand or petit larceny or rape.

(4) The murder was willful, deliberate, and premeditated, and involved the infliction of torture. For purposes of this section, torture requires proof of an intent to inflict extreme and prolonged pain.

(5) The defendant has in this proceeding been convicted of more than one offense of murder of the first or second degree, or has been convicted in a prior proceeding of the offense of murder of the first or second degree. For the purpose of this paragraph an offense committed in another jurisdiction which if committed in California would be punishable as first or second degree murder shall be deemed to be murder in the first or second degree.

(d) For the purposes of subdivision (c), the defendant shall be deemed to have physically aided in the act or acts causing death only if it is proved beyond a reasonable doubt that his conduct constitutes an assault or a battery upon the victim or if by word or conduct he orders, initiates, or coerces the actual killing of the victim.

Penal Code § 190.3

190.3. If the defendant has been found guilty of murder in the first degree, and a special circumstance has been charged and found to be true, or if the defendant may be subject to the death penalty after having been found guilty of violating subdivision (a) of Section 1672 of the Military and Veterans Code, or Section 37, 128, 219 or 4500 of this code, the trier of fact shall determine whether the penalty shall be death or life imprisonment without possibility of parole. In the proceedings on the question of penalty, evidence may be presented by both the people and the defendant as to any matter relevant to aggravation, mitigation, and sentence, including, but not limited to, the nature and circumstances of the present offense, the presence or absence of other criminal activity by the defendant which involved the use or attempted use of force or violence or which involved the expressed or implied threat to use force or violence, and the defendant's character, background, history, mental condition and physical condition.

However, no evidence shall be admitted regarding other criminal activity by the defendant which did not involve the use or attempted use of force or violence or which did not involve the expressed or implied threat to use force or violence. As used in this section, criminal activity does not require a conviction.

However, in no event shall evidence of prior criminal activity be admitted for an offense for which the defendant was prosecuted and was acquitted. ...

Except for evidence in proof of the offense or special circumstances which subject a defendant to the death penalty, no evidence may be presented by the prosecution in aggravation unless notice of the evidence to be introduced has been given to the defendant within a reasonable period of time, as determined by the court, prior to the trial. Evidence may be introduced without such notice in rebuttal to evidence introduced by the defendant in mitigation.

In determining the penalty the trier of fact shall take into account any of the following factors if relevant:

(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1.

(b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the expressed or implied threat to use force or violence.

(c) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(d) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

(e) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.

(f) Whether or not the defendant acted under extreme duress or under the substantial domination of another person.

(g) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or the affects [sic] of intoxication.

(h) The age of the defendant at the time of the crime.

(i) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

(j) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

After having heard and received all of the evidence, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall determine whether the penalty shall be death or life imprisonment without the possibility of parole.

Penal Code § 190.4

190.4. (a) Whenever special circumstances as enumerated in Section 190.2 are alleged and the trier of fact finds the defendant guilty of first degree murder, the trier of fact shall also make a special finding on the truth of each alleged special circumstance. The determination of the truth of any or all of the special circumstances shall be made by the trier of fact on the evidence presented at the trial or at the hearing held pursuant to subdivision (b) of Section 190.1.

In case of a reasonable doubt as to whether a special circumstance is true, the defendant is entitled to a finding that it is not true. The trier of fact shall make a special finding that each special circumstance charged is either true or not true. Wherever a special circumstance requires proof of the commission or attempted commission of a crime, such crime shall be charged and proved pursuant to the general law applying to the trial and conviction of the crime.

. . . . . .

If the trier of fact finds that any one or more of the special circumstances enumerated in Section 190.2 as charged is true, there shall be a separate penalty hearing, and neither the finding that any of the remaining special circumstances charged is not true, nor if the trier of fact is a jury, the inability of the jury to agree on the issue of the truth or untruth of any of the remaining special circumstances charged, shall prevent the holding of the separate penalty hearing.

. . . . . .

(c) If the trier of fact which convicted the defendant of a crime for which he may be subjected to the death penalty was a jury, the same jury shall consider any plea of not guilty by reason of insanity pursuant to Section 1026, the truth of any special circumstances which may be alleged, and the penalty to be applied, unless for good cause shown the court discharges that jury in which case a new jury shall be drawn. The court shall state facts in support of the finding of good cause upon the record and cause them to be entered into the minutes.

(d) In any case in which the defendant may be subjected to the death penalty, evidence presented at any prior phase of the trial, including any proceeding upon a plea of not guilty by reason of insanity pursuant to Section 1026, shall be considered at any subsequent phase of the trial, if the trier of fact of the prior phase is the same trier of fact at the subsequent phase.

(e) In every case in which the trier of fact has returned a verdict or finding imposing the death penalty, the defendant shall be deemed to have made an application for modification of such verdict or finding pursuant to subdivision (7) of Section 1181. In ruling on the application the judge shall review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3, and shall make an independent determination as to whether the weight of the evidence supports the jury's findings and verdicts. He shall state on the record the reason for his findings.

The judge shall set forth the reasons for his ruling on the application and direct that they be entered on the Clerk's minutes.

The denial of the modification of a death penalty verdict pursuant to subdivision (7) of Section 1181 shall be reviewed on the defendant's automatic appeal pursuant to subdivision (b) of Section 1239. The granting of the application shall be reviewed on the peoples [sic] appeal pursuant to paragraph (6) of subdivision (a) of Section 1238.

. . . . . .